IN THE

Supreme Court of the United States

No. 215

In re WILLLIAM OLIVER

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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SUMMARY OF FACTS

William Oliver, a citizen of the State of Michigan, respectfully shows:

1. I am in the business of renting pin ball machines. Upon occasion it has been charged that persons playing these machines have indulged in gambling.

2. In September, 1944, I was approached by a representative of the Midwest Bonding Company who offered to sell me a bond covering each of some fifty machines I was then displaying (R. p. 10), which would indemnify the county against any costs expended in prosecuting the operator of said machines for unlawful use of them (R. p. 12), and sold me the proposition of buying said bonds on the theory that it would show my good faith (R. p. 14).

3. Accordingly, I bought a bond* covering each machine leased by me and there was then affixed to each

*A copy of the bonds appears in one of the opinions in the companion case in re Hartley, appendix C.

such machine a notice that it was bonded by the Midwest Bonding Company. These bonds ran for a year, during which time there was no challenge as to the proper use of these machines. Some time after the year expired, I discarded these bonds.

4. On September 11, 1946, I was subpoenaed to appear as a witness before George B. Hartrick who is one of three judges of Oakland County, Michigan. At that time Judge Hartrick, in conjunction with his two fellow Circuit Judges, was acting in the capacity of grand juror (R. p. 8), pursuant to a Michigan statute which constitutes each circuit judge an inquisitor with powers somewhat similar to those of a grand jury. (Section 17217-20 Compiled Laws of Michigan, 1929. (See appendix B.)

5. Upon obeying said summons, I was ushered into the presence of the three Circuit Judges sitting secretly in chambers and was questioned extensively by them as to the circumstances of the purchase of said bonds and my disposal of them. I had had no previous intimation, before entering the judges' chambers, as to the subject on which I was to be questioned that day, and had no occasion to refresh my recollection in any way. I was naturally nervous upon being confronted with three Circuit Judges, but answered as best I could from my offhand recollection. When I was unable to name the time when I discarded these bonds and the particular manner in which they had been disposed of, I was placed in the custody of the sheriff and was held in the County Jail without any order of any court and without being permitted to consult with my attorney (R. p. 3).

6. On September 14, my attorney himself signed a petition for habeas corpus in my behalf (R. p. 4) and presented it to a Judge of the Michigan Supreme Court who issued a writ. On the same day Judge Hartrick entered

an order determining me guilty of contempt of court as of September 11, and sentencing me to sixty days in jail (R. p. 16).

7. As a matter of fact I was never in court during these proceedings, was never questioned by a court, and was declared guilty of contempt of court without having been before a court, and without any report of the proceedings before the grand jury having been made to a court.

8. Judge Hartrick made a return to the Supreme Court to my petition for habeas corpus in which he set forth parts of my testimony. I made a motion that he be required to return all of my testimony from which it would appear that I could have had no possible motive for falsifying as to the time or manner of discarding these bonds (R. p. 17). This motion was denied (R. p. 19) and the Michigan Supreme Court reviewed my case on the partial report of my testimony returned by Judge Hartrick.

9. The Michigan Supreme Court decided my appeal by a four to four decision, four judges holding the record showed no evidence of falsifying and four holding that it did show such evidence.

STATUTORY PROVISION GIVING JURISDICTION TO THIS COURT

10. The summary conviction of petitioner of contempt of court, without his ever having been a witness before the Court, and without notice or hearing by the Court, was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States which provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

11. Section 237 (b) of the Judicial Code as amended, provides:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination * * *, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Consttiution * * *."

QUESTIONS PRESENTED

12. The following questions are presented:

(1) Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?

(2) Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court summarily and without trial for alleged false testimony, where the falsity of such testimony is not self-evident?

(3) Is it a denial of due process summarily to convict one of contempt of court by reason of alleged perjury before a one-man grand juror?

HOW QUESTIONS RAISED AND DISPOSED OF IN THE MICHIGAN COURT

13. I testified as a witness in secret chambers and not in court. I was taken directly from such chambers to the county jail and there imprisoned. There was thus no opportunity of raising any question in any inferior court. Application for writ of habeas corpus was made direct to the Michigan Supreme Court and the questions here presented were raised in the brief filed in that court. That court held against me on these propositions.

REASONS FOR ALLOWANCE OF WRIT

14. (a) Scores of Michigan citizens have been summarily convicted of contempt of court, even though they have never been before a court, by Judges acting as one-man grand jurors.

(b) The judges do this without restraint since the circuit judge of each county is a grand juror in his county and there is thus no relief except by appeal to the Michigan Supreme Court; and further, the average citizen either lacks knowledge of his rights or lacks the financial means of protecting them.

(c) Appeals from such convictions are not a matter of right but rest in the discretion of the Michigan Supreme Court, and that court has established the practice, as in the instant case, of permitting the grand juror to return only so much of the witness's testimony as he sees fit to return. Therefore, even when a review is granted, it is upon a partial record.

(d) The foregoing practice is a clear violation of the due process clause of the Federal Constitution but the Michigan courts have consistently refused to recognize that fact.

(e) The protection ordained by the Federal Constitution thus becomes meaningless for Michigan citizens unless this court intercedes in this Michigan situation.

COMPANION CASE

15. Leo Hartley was adjudged guilty of contempt by the Oakland Circuit Court under much the same circumstances and with the same result. The decision in his case is referred to in the decision in my case, and is appended hereto as Appendix C. It is reported in 317 Mich. (Advance Sheets) 441.

PRAYER

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this court directed to the Supreme Court of the State of Michigan commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of said cause to the end that said cause be reviewed and determined by this court and that the judgment of the said Supreme Court for the State of Michigan be reversed and petitioner discharged from custody.

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BRIEF SUPPORTING PETITION FOR CERTIORARI

SUMMARY OF FACTS

A Michigan statute constitutes a Circuit Judge an Inquisitor with powers similar to a Grand Jury. (Sec. 17217-20 C. L. 1929). (See Appendix B.) Oakland County has three Circuit Judges. One of them, Judge Hartrick, acted as a grand juror under this statute, but had the other two judges sit in with him in his inquiry (R. p. 8).

On September 11, 1947, petitioner was summoned before these judges as a witness. He met with them in secret chambers and was questioned as to his purchase and disposal of certain bonds. They deemed his testimony untruthful and gave him into the custody of the sheriff. He was then denied the right to consult counsel (R. p. 3).

On September 14, his counsel, acting in his behalf, obtained a writ of habeas corpus from the Michigan Supreme Court. On that day an order was entered by Judge Hartwick in the Oakland Circuit Court adjudging him guilty of contempt of *court* (R. p. 15).

At no time, however, was he ever in the presence of a court.

In the Michigan Supreme Court petitioner contended that his imprisonment was a denial of due process. That court, by a four to four decision sustained his conviction, one half holding there was contempt and the other half holding there was no contempt.

There was, however, no dissent on the question of undue process, though the opinion sustaining petitioner is critical of the abuse of contempt powers by Courts.

IT IS A DENIAL OF DUE PROCESS TO CONVICT, WITHOUT NOTICE AND A TRIAL, FOR CONTEMPT OF COURT WHEN THE ALLEGED MISCONDUCT IS NOT COMMITTED IN OPEN COURT

The Michigan One Man Grand Jury Statute grants power to a one-man grand juror to punish for contempt a witness summoned before him only for "neglect or refusal to appear in response to such summons or to answer any questions which said justice or judge may require material to such inquiry." (Sec. 17218 C. L. 1929.) (Appendix B.)

In the instant case there was no refusal to appeal nor a refusal to answer questions. To justify imprisonment, therefore, Judge Hartrick had to invoke his contempt powers as a Circuit Judge. The power of the court to punish for contempt, and the procedure, therefor, is regulated in Michigan by statute. (C. L. 1929, Sec. 13910 *et seq.*) (Appendix A.) It provides:

> "Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:*
>
> 1. Disorderly, contemptuous, or insolent behavior, *committed during its sitting,* in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;" (Sec. 13910.)

The statute then provides that if any such misconduct "shall be committed in the immediate view and presence of the court, it may be punished summarily" (Sec. 13911), but if not committed in the presence of the court an affidavit charging the facts shall be filed, a copy served upon the accused and a reasonable time allowed to make his defense" (Sec. 13912).

The above provisions are held to be merely declaratory of the common law (*Nichols v. Judge*, 130 Mich. 187) and accord with this court's holdings that, at common law, where contempts are not committed in *open court* "the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." *Re Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699; *Cooke v. U. S.*, 267 U. S. 517, 69 L. Ed. 767. And it is therefore held:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation."
>
> *Cooke v. U. S., supra.*

In the instant case the petitioner was never in the presence of a court. He was thus guilty of no misconduct in "open court" or, in the language of the Michigan statute, "*during its sitting.*" His summary confinement on September 11, 1946, was wholly illegal and the order entered on September 14, adjudging him guilty of contempt of court did not cure the illegality. To translate his con-

tempt of the grand jury, if there were one, into a contempt of court would require the familiar practice of a report to the Court and bringing the recalcitrant witness before the court by order to show cause (e. g., *In re Michael*, 326 U. S. 224, 90 L. Ed. 30, 66 Sup. Ct. 78).

IT IS A DENIAL OF DUE PROCESS TO CONVICT FOR CONTEMPT OF COURT SUMMARILY AND WITHOUT TRIAL WHERE THE ALLEGED FALSITY OF TESTIMONY IS NOT SELF-EVIDENT

For the purpose of this argument we are assuming that the testimony in question was given in open court. There then remain the further questions, was this testimony false on its face, and if not, may a judge summarily convict for contempt merely because he disbelieves it.

That the testimony was not false upon its face is answered by the fact that four members of the Michigan Supreme Court have so held (R. p. 28).

We recognize that where the falsity of testimony is self-evident, a summary conviction may follow (e. g., *U. S. v. Apel*, 211 Fed. 495). But where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing on the question of the falsity of the testimony.

Boules v. U. S., 44 Fed. 2nd, 115;
Blim v. U. S., 68 Fed. 2nd, 484;
Clark v. U. S., 61 Fed. 2nd, 695;
In re Gottman, 118 Fed. 2nd, 425;
People v. Hille, 192 Ill. App. 139;
People v. Anderson, 272 Ill. App. 93;
People v. La Scola, 282 Ill. App. 328;

People v. Tomlinson, 296 Ill. App. 609, 16 N. E. (2nd) 940;
People v. Butwill, 312 Ill. App. 218, 38 N. E. (2nd) 377;
Riley v. Wallace, 188 Ky. 471, 222 S. W. 1085;
Wilder v. Sampson, 279 Ky. 103 (1939), 129 S. W. (2nd) 1022;
Hegelow v. State, 24 Ohio App. 103, 155 N. E. 620;
State v. Coleman, 138 Fla. 555, 189 So. 713.

FALSE TESTIMONY BEFORE A ONE-MAN GRAND JUROR MAY NOT BE THE BASIS OF CONVICTION OF CONTEMPT OF COURT

For a long time all Courts construed their contempt powers as giving them absolute power to treat perjury as contempt. But these holdings were restricted by *Ex Parte Hudgins,* 249 U. S. 378, 63 L. ed. 656, 30 Sup. Ct. 337, which holds that, to be punishable as contempt, perjury must have "the further element of obstruction to the court in the performance of its duty."

The precise question here presented was decided in *In re Michael,* 326 U. S. 224, 66 S. Ct. 78, 90 L. ed. 30. There a witness testified before a grand jury. He was brought before the District Court and a trial was had upon the issue of whether he had testified falsely before the grand jury. He was convicted. This Court granted certiorari and held that false testimony before a grand jury does not obstruct the judicial process and may not therefore be the basis of a conviction of contempt of court.

It follows, therefore, that Judges acting as grand jurors under the Michigan statute are without power to punish as for contempt of court one appearing as a witness be-

fore them as grand jurors, even though such witness be deemed guilty of perjury.

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APPENDIX A

Compiled Law of Michigan—1929.

CHAPTER V.

OF PROCEEDINGS FOR CONTEMPT

13910. CONTEMPT IN COURT OF RECORD; GROUNDS. Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:*

1. Disorderly, contemptuous, or insolent behavior, committing *during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due* to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;

* * * * * *

13911. SAME; SUMMARY PUNISHMENT WHEN MISCONDUCT IS IN PRESENCE OF THE COURT. Sec. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed.

13912. SAME; MISCONDUCT NOT IN PRESENCE OF COURT. Sec. 3. When such misconduct is not so committed, the court shall be satisfied by due proof, by affidavit of the facts charged, and shall cause a copy of such affidavit to be served on the party accused, a reasonable time to enable him to make his defense, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpoena.

APPENDIX B

Michigan Inquisitorial Statute—Michigan Compiled Laws 1929

17217. Whenever by reason of the filing of any complaint, which may be information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justices or judge may require concerning any violation of law about which he may be questioned: and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

17218. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by

law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said offier. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

17219. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exeeeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such questions, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

17220. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall

be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

APPENDIX C

Opinion in Companion Case of In re Hartley (reported in 317 Mich. (advance sheets) 441)

STATE OF MICHIGAN

SUPREME COURT

In re Petition of William F. Dohany for a Writ of Habeas Corpus and Certiorari on behalf of Leo Hartley.

Before the Entire Bench.
Dethmers, J.

The Honorable George B. Hartrick is one of the circuit judges of the sixth judicial circuit duly assigned to conduct, under the provisions of 3 Comp. Laws of 1929, **17217 to 17220 (Stat. Ann. **28.943 to 28.946), a so-called one man grand jury investigation of alleged gambling and corruption of public officials in Oakland County.

In the course of the investigation it was discovered that the plaintiff, Leo Hartley, was the owner of certain pinball machines operated throughout the County of Oakland, which were suspected of having been used for gambling purposes. It was further discovered that one C. A. Mitchell, doing business under the registered, assumed name of Midwest Bonding Company, had sold to Hartley

a number of "bonds," a specimen of which reads as follows:

"EXHIBIT 'A'

"MIDWEST BONDING COMPANY

"(Operating and existing under and by virtue of the Laws of the State of Michigan, Act No. 101, Public Acts for the year One Thousand Nine Hundred Seven.)

"BOND TO GUARANTEE LEGAL PERFORMANCE

"Know all men by these presents, that Midwest Bonding Company hereinafter designated as 'Company' is hereby held and firmly bound unto Oakland County, Michigan in a sum not to exceed Two Hundred Dollars lawful money of the United States of America.

"The condition of this obligation is such, that the said Company agrees to reimburse said Oakland County, Michigan, for all moneys expended as actual costs to prosecute and convict any person or persons violating the conditions hereinafter set forth under Paragraphs (a) (b) (c) and (d); said costs shall not exceed the sum above set forth; it being hereby expressly understood and agreed that upon a conviction being had for any default in this bond that this obligation shall terminate and be null and void in so far as any subsequent violation is concerned.

"Paragraph (a) The company warrants that the certain Skill Game Machine bearing 'Midwest Tag No.....:' owned by..... located at.....will not be played or operated by any person or persons who have not attained the age of Eighteen years.

"(b) That no player of said machine shall receive any prize, reward or gain from or on account of having played said machine.

"(c) That no player, while playing said machine, shall enter into any agreement or wager to receive any prize, reward or gain from the results obtained.

"(d) That said machine shall be operated and played for amusement and skill purposes only.

"This bond shall take effect at 12 o'clock noon of the 1st day of September, A. D. 1945 and continue in effect until 12 o'clock noon of the 1st day of September 1946 unless cancelled prior thereto as above provided for its automatic termination, or by written notice delivered to Oakland County, Michigan, and such cancellation shall be without prejudice to any claim originating prior thereto.

Midwest Bonding Company
By C. A. Mitchell"

Judge Hartrick examined the bonds, deemed them worthless and illegal, and suspected that Mitchell had in that connection obtained money under false pretenses. Hartley was thereupon subpoenaed before the grand jury and questioned concerning his purchase of the bonds. He gave answers which, in the opinion of Judge Hartrick, were false and evasive. Stating that he was acting not only in the capacity of grand jury, but as circuit judge, the judge thereupon adjudged Hartley in contempt of court and sentenced him to serve sixty days in the county jail.

Plaintiff has filed a petition for a Writ of Habeas Corpus and Ancillary Writ of Certiorari. He urges that his sentence for contempt and subsequent detention are illegal because:

1. Due process of law under both the federal and state constitutions requires the filing of charges, a notice to the accused and a hearing in all contempt cases not committed in open court.

2. It is a denial of due process of law for a judge summarily to adjudge one guilty of contempt of court upon the basis of alleged false swearing, except where the court has personal knowledge of the falsity of the testimony.

3. A one man grand jury does not act as a court; therefore, contemptuous misbehavior toward a grand juror is not a direct contempt of court and is not punishable summarily.

4. The plaintiff was not in fact guilty of contempt of court.

The first three grounds may appropriately be considered together as all three are directed to the same general question of the right of the judge, under the circumstances here presented, to summarily adjudge one guilty of contempt without filing of charges, notice and hearing thereon.

In conducting a so-called one man grand jury investigation, a circuit judge acts in a judicial capacity. Mundy v. McDonald, 216 Mich. 44; In Re Slattery, 310 Mich. 458 (certiorari denied, 325 U. S. 876). This court has previously upheld the power of a circuit judge, acting as a one man grand jury, to punish summarily for contempt. People v. Wolfson, 264 Mich. 409; In Re Cohen, 295 Mich. 743. See also In Re Slattery, supra, and cases cited therein (467). While, in the Slattery case, the judge adjourned the one man grand jury proceeding and then reconvened as a circuit court before adjudging the witness guilty of contempt, in effect he was still acting as the grand jury. He made an adjudication based on his per-

sonal knowledge of what had transpired before him as a one man grand jury. No record of the pertinent grand jury proceedings was transcribed and presented to him as a circuit judge. That, we held, would have been an idle gesture. It would be an equally idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.

Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp. Laws of 1929, *13912 (Stat. Ann. *27.513). It was properly dealt with summarily . 3 Comp. Laws 1929, **13910-11 (Stat. Ann. **27.511-27.512):

> "A circuit judge may take cognizance of his own knowledge of contempts committed during the sitting of the court, and its 'immediate view and presence,' and may proceed to punish summarily persons guilty of such contempts, basing his action entirely upon his own knowledge." In Re Emery T. Wood (syllabus), 82 Mich. 75.

Was plaintiff, in fact, guilty of contempt? As aptly stated in defendant's brief:

> "A mere glance at Exhibit A promptly challenges the attention of anyone to its total lack of value and to its purpose. For instance, the so-called bond does not run to petitioner. It affords him no protection whatever. His name nowhere appears in it. It would be physically impossible for Mitchell to perform the 'warranties' contained therein.

"Yet when called as a witness to explain his purchase of the bonds and his investigation of their legality, he answered as follows * * *:"

There follows portions of plaintiff's testimony, included in defendant's return to the writ of certiorari, of which we deem pertinent here the following:

"Q. Did you know Carman Mitchell prior to the time he approached you to sell you these bonds?

"A. I didn't know, only met him. I had met him a couple of times. I didn't know him to speak to. * * *

"Q. Did you notice the name of the Bonding Agency on the bond?

"A. I didn't pay any particular attention to the name until you gentlemen explained to me in court. I noticed Mid West. He told me Mid West, but I don't believe I made the check out to Mid West.

"Q. Didn't you investigate the Mid West Bonding Company to see who was operating it?

"A. No.

"Q. Did you ask Mitchell who was operating it?

"A. I didn't ask him who was operating it.

"Q. Didn't you care?

"A. Why, I should have investigated, but— * * *

"Q. But you never went to the prosecutor's office or any lawyer in private practice, to have these bonds examined, did you?

"A. No, I didn't.

"Q. You knew, Mr. Hartley, that he had no way of protecting you or your machines when you gave him this money, didn't you?

"A. Well, I didn't, I didn't know too much about it, the only thing the other fellows had bought them and just seemed like the thing to do to buy them.

"Q. Do you want us to understand that you just gave him the, this money each time you gave it without knowing what you were giving it to him for? Now, wasn't it a fact, Mr. Hartley, that you were afraid if you didn't buy these bonds or give Mitchell this money, something would happen to your machines?

"A. It isn't that I was afraid something would happen to them, but different times that I know, in 1937 we had games, we had to take them out because they ruled against them, or something.

"Q. Well, did you think when you gave Mitchell this money he could keep your machines in operation for you?

"A. No, it was that, it was to, well anything that would like it would keep them in operation, not that they were illegal or something, but always trying to pass laws, one thing and another, but the main reason I bought them was because other operators had got them and the big operators, so I thought it was the thing for me to do. * * *

"Q. Now, as a matter of fact, you were afraid if you didn't give Mitchell this money that something would happen to your machines?

"A. No, I wouldn't.

"Q. Well, how did you think he, as an ordinary individual, would give you any protection on your machines?

"A. Why, I don't know he could give me, as an ordinary individual, but I bought the bonds, he gave the bonds to me to reimburse the county for expenses. It sounded all right to me. I should had had them checked.

"Q. You said something about the law changing, or the law affecting your pin ball machines. Now, how did you think Mitchell could alter that law or keep it from being enforced?

"A. Well, that never entered my mind about that. * * *

"Q. You knew your machines were legal, didn't you?

"A. Yes.

"Q. You had an absolute right to operate them?

"A. That is right.

"Q. Just how did you think you needed any help from Mitchell?

"A. Well, the only reason I bought them is because, because I thought that these other fellows bought them and they usually know more about than I do.

"Q. Well, do you want us to think you did it because, just because somebody else did?

"A. Well that is one reason I bought them. That is the main reason, and the other is I thought the bonding company must be a good thing, or he was a bondsman, and I didn't know what it was all about. * * *

"Q. Did Mitchell explain to you that the bonds would protect the county in case somebody put the machines to an illegal use?

"A. He read the bond to me and the bond, the way it read to reimburse the county for, if they had to prosecute cases. I don't know. * * *

"Q. Didn't it occur to you to consult any official of the county?

A. No, because I asked the other operators and they had bought them, so I thought it must be all right.

"Q. Why would you consult the other operators in preference to county officials?

"A. Well, they are the ones that bought them. * * *

"Q. Did you ever hear of anyone else in your life writing a bond which would protect a county or agree to reimburse a county for any expense arising out of a prosecution?

"A. No. * * *

"Judge Hartrick: Your story, Mr. Hartley, isn't the story of a reasonable man, a reasonable man of your obvious powers of comprehension. You didn't buy the bonds offhand when the man asked you to, you made an investigation, and then

> you haven't given us a very satisfactory story of that investigation, what was said, and you haven't given us a logical man's statement of why you parted with the money, and you have all the appearances, to me you have all the appearances of a very intelligent, comprehensive witness, that is capable of understanding business and business transactions, and I don't believe you claim any incapacity along that line, do you?
>
> "A. No."

In its return to the writ of certiorari the court stated that it had found and determined that plaintiff had given false and evasive answers concerning matters material to the grand jury inquiry and was, accordingly, guilty of contempt of court. As stated in the case of In Re Slattery, supra, page 477:

> "The law is stated by Mr. Justice Fellows, speaking for the court in People v. Doe, 226 Mich. 5:
>
> "'The return must be taken as true. In this certiorari proceeding we are not the triers of the facts. We do not weigh the testimony. We may and it is our duty to examine the testimony to see if there is any evidence to support the finding. If there is we can not measure it. The finding must be accepted as true. This is settled law.'"

There is abundant evidence to support the finding of the court. It will be noted from the above testimony that plaintiff did not know Mitchell well enough to speak to, that he made no investigation of Midwest Bonding Company and no inquiry as to who was operating it. Yet he gave Mitchell money for bonds which on their face were worthless. When pressed to state his reasons for parting with good money for such so-called bonds, his first explanation was that he "didn't know too much about it,"

and then it "just seemed like the thing to do." At one point he testified that the fact that other operators had bought bonds was his *main* reason for doing so; when asked as to his other reasons, which upon further interrogation were made to appear ludicrous, he claimed that it his *only* reason; and finally, when this appeared increasingly foolish, he claimed it as merely *one* of his reasons. No more graphic demonstration of frantic flight from one untenable position to another could be imagined. Again, he offered as a reason that when in 1937 he had operated such games, they had been ruled against, but he immediately followed with the answer that he did not think Mitchell could prevent such adverse rulings and thereupon changed his reason, saying that while he considered the operations legal there were always attempts to pass laws against them. When asked later whether he had thought Mitchell could prevent passage of such laws or their enforcement, he testified that such thought had never entered his mind. Plaintiff's next explanation was that he had nursed a fond hope of saving the county harmless against costs incurred in the prosecution of persons playing his machines illegally. Then follows his explanation that he knew his machines were legal, but that he bought the bonds because he thought the bonding company, which he had previously admitted he had not investigated, must be a good thing. Then, amazingly enough, he bought the bonds because he thought Mitchell must be a bondsman. And, finally, he ended in the same vein as he started by saying that he "didn't know what it was all about."

Plaintiff's answers were obvious attempts to fob off inquiry; they were evasive and inconsistent; they reveal a manifest desire and attempt to conceal plaintiff's real reason for purchasing the bonds; they amount to sham,

fully as effective in thwarting proper inquiry by the court as an absolute refusal to answer questions at all. In the Slattery case we enunciated the applicable rule by quoting with approval from United States v. Appel, 211 Fed. 495-6, the following:

> "'The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept that night before, if he was sane and sober, or that he could not tell whether he had been married or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry.'"

Plaintiff was properly adjudged guilty of contempt of court and sentenced therefor. Petitions for habeas corpus and certiorari are dismissed and petitioner is remanded to the custody of the Oakland County Sheriff to serve the remainder of his sentence or until the same shall have been commuted or suspended by the circuit judge, as provided by law.

Leland W. Carr
George E. Bushnell
Edward M. Sharpe
Concurred with Dethmers, J.

STATE OF MICHIGAN

SUPREME COURT

In re Petition of William F. Dohany for a Writ of Habeas Corpus and Certiorari on behalf of Leo Hartley.

Before the Entire Bench.
Boyles, J.

I am unable to concur in affirming the judgment of contempt and the sentence therefor. The writ of habeas corpus together with ancillary writ of certiorari were issued on the filing of the plaintiff's petition; and at the inception of these proceedings plaintiff was released from sustody on bail. The return to the ancillary writ of certiorari fails completely to support the finding that Hartley gave false or evasive answers. There is no claim that Hartley was contemptuous in his manner of demeanor in the grand jury room.

The testimony Hartley gave before the grand jury is set forth in full by Mr. Justice Dethmers, together with the finding announced by the grand juror at its conclusion. According to the return, this occurred in the grand jury room late in the evening of September 11, 1946. Hartley was without counsel. The grand juror then and there summarily sentenced Hartley to 60 days in the county jail for alleged contempt of court, and Hartley was forthwith confined. The order adjudging contempt and the commitment therefor was not formally made and entered until September 14th, due, as the grand juror returns, to his being stricken with illness and removed to a

hospital. William F. Dohany, who appears here as attorney for Hartley, and on whose petition in behalf of Hartley this proceeding was brought, has filed an affidavit which is in the record—subscribed and sworn to on September 14, 1946, stating as follows:

> "That your affiant has been refused permission to talk to the said prisoner by order of the sheriff and the judges of the Oakland County circuit court.
>
> That your affiant has made diligent search and inquiry as to the cause of confinement of said Leo Hartley but has been unable to find any legal record of said commitment."

Nowhere in the record or the return is there a denial of the truth of the foregoing statements, or an explanation as to why Hartley was denied the benefit of counsel as late as the third day after his confinement began. I agree, as stated by Mr. Justice Fellows in People v. Doe, 226 Mich. 5, and repeated in Re Slattery, 310 Michigan, 458, that it is our duty to examine the testimony only to see if there is any evidence to support the finding of contempt. I am not able to infer from the testimony, as quoted by Mr. Justice Dethmers, that Hartley was giving evasive or false answers, as found by the sentencing grand juror. The Slattery Case is no precedent for such a finding or conclusion in the instant case. In that case there was considerable foundation to lead to the conclusion that Slattery was giving false, or at least evasive, answers when he repeatedly answered "I don't remember" to questions quite obviously within recent memory, and of recent occurrence. The facts and circumstances in the Slattery Case have little resemblance to those in the record now before us. Slattery repeatedly answered "I don't remember" to questions which were quite obviously within his memory. In the instant case Hartley answered every question asked him, at least in so far as the record

here discloses. The answers he gave were just as compatible with the truth as otherwise. Nothing in this record warrants any other conclusion. There may have been other testimony or other circumstances within the knowledge of the grand juror which impelled him to a different conclusion. If so, it does not appear in this record. We have nothing here to show that Hartley was a lawyer, or above the average in legal skill or knowledge. We have nothing to show how much Hartley paid for the bond or bonds in question. It is apparent that the so-called "bond" shown in the record might be confusing to a layman. The bonds were worthless, a conclusion easily reached when given consideration by a lawyer, but it is fully compatible with the truth that Hartley, as he testified, was induced to pay for them by the knowledge that the other "big operators" had gotten them, that he bought the bonds to reimburse the county for expenses, and that "it sounded all right" to him. The investigation was concerning gambling, bribery of public officers, and it is not claimed that the seller of the so-called "bonds" was under investigation for obtaining money under false pretenses.

Inasmuch as the record does not contain any evidence tending to support the finding of evasiveness or untruthfulness in the answers given by plaintiff, the order of his commitment under which he technically is still in custody is hereby vacated, plaintiff released, and his bond cancelled. Our order herein shall be certified to the circuit court of Oakland county.

Henry M. Butzel
Neil E. Reid
Walter H. North
Concurred with Boyles, J.